In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-279

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MEMORANDUM FOR THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE MOTIONS TO AFFIRM

The basic thrust of both motions to affirm is that appellees were prejudiced by the failure of the Commission to hold oral hearings and that therefore no conflict exists between the decision below requiring an oral hearing and the decision in *Long Island Railroad Co.* v. *United States*, 318 F. Supp. 490 (E.D. N.Y.). We pointed out in our Jurisdictional State-

ment (pp. 12, 15) that the district court failed to scrutinize appellees' mere assertions of prejudice to determine whether either appellee had shown a need for cross-examination or the presentation of live testimony—a defect which in itself creates a conflict with the *Long Island* decision. We now submit that the particular contentions made in the motions to affirm—some of which were not raised before the Commission and thus cannot be relied upon here[1]—are without merit.

FEC contends (FEC Motion 8-13) that the Commission has initiated incentive per diem based upon a one-day standard for delivering freight cars once a shipper orders such cars and that FEC is prepared to show that such a standard is unworkable. But the Commission specifically did not base its decision on a one-day standard as claimed by FEC, and fully considered the "service factors" that FEC claims were ignored (J.S. 89a). Similarly, FEC's alleged need to cross-examine Commission service agents[2] to test the impact of the over-ordering of freight cars by shippers is sufficiently answered by the Commission's finding that in 1968 cars were actually placed against 98.7 percent of orders received (J.S. 66a). Since practically all orders were eventually filled, there was

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[1] See *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 36-38; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155.

[2] Such a request was never directed to the Commission and has the potential for protracted delay (see J.S. 46a-48a); there are more than 40 service agents who would be subject to cross-examination on this narrow point alone..

no significant overordering problem and no need for the type of cross-examination proposed by FEC. Finally, FEC contends (FEC Motion 13-14) that the Commission's refusal to exempt terminating lines from the incentive per diem charges will have a disastrous financial impact upon it which is unwarranted because of FEC's "unmatched" efficiency in moving freight cars. The Commission, however, evaluated the submissions and special claims of terminating lines and concluded that no showing of an undue burden had been made (J.S. 101a-102a).

Seaboard continues to challenge the decision to single out standard boxcars for special treatment (Seaboard Motion 26-31). Relying heavily upon the Commission's 1967 decision (332 I.C.C. 11), it complains that the agency did not adequately consider the need for other types of equipment, such as specially equipped boxcars. By relying on the 1967 decision, however, Seaboard ignores the intervening 1968 freight car study, which demonstrated that plain boxcars present a problem of distinguishable magnitude (J.S. 66a), and it ignores the Commission's findings that competition, economics and higher basic per diem will provide fair compensation and incentives for the continued purchase of specialized equipment (J.S. 91a-92a).[3]

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[3] Moreover, Seaboard's attacks on the Commission's findings and rationale (Seaboard Motion 31-38) largely ignore the fundamental difference between the Commission's 1967 proceeding and its current effort to deal with car shortages. The 1967 proceeding considered only a short-term proposal (332 I.C.C. 11, 12, 16); the instant plan is a long-term effort

In the context of the open-ended proceeding at
here—in the face of a congressional directive t
with a critical nationwide car shortage proble
is worth reemphasizing that "the decision here
for a leap of judgment by the Commission whi
tailed figures would inform but could not determ
Long Island Railroad Co. v. *United States*, *supra*,
F. Supp. at 499. Experience—rather than the ho
of extensive oral hearings—will provide the only
basis for revision of the Commission's incentive
diem order.

For the reasons stated herein and in our Juris
tional Statement, the motions to affirm should be
nied and probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1971.

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to improve car utilization or, alternatively, to expand t
supply of the type of car most urgently needed. The Com
sion has indicated its intention to revise this plan as exp
ence dictates (J.S. 103a), taking into account problems re
ing to other types of equipment (J.S. 66a, 91a).

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